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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, Individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, Individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, Individually and as members of the Indiana State Election Board; and INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JURISDICTIONAL STATEMENT FILED, JANUARY 26, 1973

CONSIDERATION OF THE QUESTION OF JURISDICTION POSTPONED TO THE HEARING ON THE MERITS, MARCH 19, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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Relevant Docket Entries

DATE	PROCEEDINGS
8-30-72	Complaint filed.
	Motion for Preliminary Injunction filed.
	Memorandum in Support of Preliminary Injunction filed.
	Motion to Convene Three-Judge District Court.
	Memorandum in Support of Motion to Convene Three-Judge District Court.
	Certificate of Service filed indicating service upon Atty. Gen. of Indiana.
9-1-72	Order entered: George N. Beamer now withdraws from the consideration of this case because of his inability to handle the case on an emergency basis. I have reservations to leave on vacation on Saturday, September 2, 1972, which cannot be cancelled without giving up completely a vacation during 1972 and have matters that must be disposed of before I leave prevent me from hearing this matter during the afternoon of September 1, 1972. (SE) Beamer: J (copies to counsel)
9/5/72	Plaintiffs file motion for temporary restraining order. Cert. of ser. MB
9/8/72	Amended Complaint filed with cer. of ser.
9-7-72	Chief Judge Luther M. Swygert enters order designating Three Judge Panel. Panel composed of Honorable Robert A. Sprecher, Honorable James E. Noland and Honorable Jesse E. Eschbach, mb

Relevant Docket Entries

DATE	PROCEEDINGS
9-11-72	Theodore L. Sendak, Atty. Gen. of Ind. enters appearance by Thomas Neal and Edward W. Johnson for deft. Cert. of serv. MB
9-11-72	Memorandum and order entered. (SE) Eschbach. Pltf's motion for temporary restraining order is denied; provided, however, defts. are ordered and directed to file written showing within 7 days reflecting last date upon which ballots may be printed for general election. Copy to Wm. Rastetter and Thomas Neal and Edward W. Johnson 9-11-72. MB
9-13-72	Notice on hearing on motion for preliminary injunction set for 10:00 a.m., September 28, 1972 at Hammond mailed to R. Davy Eaglesfield, Robert Justice, William Rastetter, Thomas Neal and Edward W. Johnson 9-13-72. MB
9/21/72	Pursuant to pltfs' second motion for temporary restraining order filed this date, court enters order. (SE) Eschbach: Judge. Motion is denied. Copies to R. Davy Eaglesfield, Robert Justice, Wm. Rastetter; and Edward W. Johnson 9/22/72. js
9-25-72	Parties file Stipulation of Facts. (copies to Judge Robert A. Sprecher, Judge James E. Noland and Judge Jesse E. Eschbach)
9-21-72	Pltfs. file motion for temporary restraining order. Affidavit, memo in support and proof of service attached. MB

Relevant Docket Entries

DATE	PROCEEDINGS
9-28-72	Defendants file Motion to Dismiss with Memorandum thereon and certificate of service attached thereto.
9/28/72	Defts. file Answer to Amended Complaint. (copies distributed to all 3 judges this day.)
9-28-72	Pltf. appears by counsel Wm. Rastetter. Defts. represented by counsel Thomas Neal, Elizabeth Hamacher and Ed. Johnson, 72 H 224; 72 H 230 and 72 H 245 are consolidated for trial on merits. Cause submitted to the Court for hearing on defts' motion to dismiss. Argus. hrd. Mo. denied. Cause submitted to Ct. for hearing on merits. Pltf. waives opening statement. Defts present opening statement. Pltf. presents evidence, concludes and rests. Defts' present evidence, conclude and rest. Court finds that the loyalty oath contained in Ind. Ann. Stat. 29-3812 is severable in that the first portion is constitutional and the second segment is unconstitutional. The court further finds the defts. are ordered and directed to accept from the Communist Party of Indiana, an oath consistent with this opinion at any time prior to 2:00 p.m. on Friday, 9-29-72. (SE) SPRECHER, NOLAND & ESCHBACH. (copies to all counsel of record and all Judges)
10/3/72	Pltf. files petition for Mandate to enforce the prior order of the Court. Cert. of ser. and affidavit attached. MB

Relevant Docket Entries

DATE	PROCEEDINGS
10/3/72	Defts. file verified motion to reconsider and for stay. Cert. of serv. MB
10/4/72	Pursuant to Petition for Mandate and Motion to reconsider and for stay filed 10/3/72, order entered. (SE) Eschbach. The issue raised by the defendants' motion to reconsider is moot and does not require further ruling by this court. Petition for mandate by plaintiffs is denied. The State Election Board acted in accordance with the precise wording of this court's order of Sept. 28, 1972. Copy to Thomas Neal, Elizabeth Hamacher, Ed Johnson, R. Davy Eaglesfield, Robert Justice and William Rastetter 10/4/72. MB
10/11/72	Summons returned served on Thurman D. Moss by serving Wayne Davis on 9/6/72. (4.00)
10/11/72	Summons returned served on Indiana State Election Board by serving Wayne Davis on 9/6/72. (4.00)
10/11/72	Summons returned served on Hon. Edgar D. Whitcomb by serving his secretary Evelyn Hauser on 9/6/72. (4.00)
10/11/72	Summons returned served on Karl J. Stipher by serving Wayne Davis on 9/6/72. (4.00)
10/10/72	Pltfs. file Motion to Amend with cer. of ser. (all copies forwarded to Judge Eschbach via Mrs. Green's instructions and they will distribute copies to other Judges)

Relevant Docket Entries

DATE	PROCEEDINGS
10/10/72	Pltfs. file Notice of Appeal (Appeal due: Mon., Nov. 20, 1972) Clerk's Certificate issued. (copies to all counsel and Judges)
10-17-72	Plaintiffs file Motion to Withdraw Notice of Appeal with certificate of service thereon. (copies to all Judges)
10/30/72	Order entered. (SE) Eschbach. Pursuant to motion to leave to withdraw Notice of Appeal, the Notice of Appeal is now withdrawn. Pursuant to motion to amend the memorandum and order issued Sept. 28, the motion is denied. Order entered pursuant to the authority and vote of the entire panel. Copy to William Rastetter and Thomas Neal 11/1/72. MB
11-16-72	Defts. file Notice of Appeal with p.s. Clerk's Cert. issued and distributed.
11/29/72	Pltfs. file Notice of Appeal. Clerk's certificate issued. (copies of cert. and appeal forwarded to counsel) Ex. 3 Judges (counsel notified that $5.00 appeal fee is due.) —pd
3/26/73	Order from Supreme Court of the United States: The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.
3/26/73	Indiana Civil Liberties Union files Designation of Record to be forwarded to Supreme Court.

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Affidavit of Mike Bayer in Support of Motion for Temporary Restraining Order

MIKE BAYER, being duly sworn upon his oath, deposes and says:

1. That on August 31, 1972, at approximately 11:00 A.M., affiant went to the office of Governor Edgar D. Whitcomb pursuant to Burns IND. ANN. STAT. §§ 29-3801 *et seq.* for the purpose of submitting 1,634 petitions containing 12,193 signatures in support of the attempt of the Communist Party to secure a place on the ballot for electors pledged to Gus Hall and Jarvis Tyner, the candidates of the Communist Party.

2. That affiant personally tendered the petitions to William Lloyd, administrative assistant to and representative of Edgar D. Whitcomb, Governor of the State of Indiana.

3. That Mr. Lloyd informed affiant that he would not accept the petitions on behalf of the Governor.

4. That Mr. Lloyd informed affiant that the Governor would not certify the petitions as legal petitions.

5. That Mr. Lloyd stated that the basis for his action was Burns IND. ANN. STAT. § 29-3812 and Attorney General Opinion No. 11.

6. That while Mr. Lloyd said he would allow affiant to leave the petitions at the Governor's office since it was a public office, he would not give affiant a receipt for them.

Affidavit of Mike Bayer in Support of Motion

7. That in view of the above-mentioned facts, affiant did not leave the petitions at the office.

8. That affiant is prepared to again tender the petitions at any time.

MIKE BAYER

Subscribed and sworn to before me this 31st day of August, 1972.

PAULETTE E. CLARK
Notary Public

My Commission Expires:
4-13-76

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Affidavit of Simon Boorda in Support of Motion for Temporary Restraining Order

SIMON BOORDA, being duly sworn upon his oath, deposes and says:

1. That on August 31, 1972, at approximately 11:00 A.M., affiant went to the office of Governor Edgar D. Whitcomb pursuant to Burns IND. ANN. STAT. §§ 29-3801 *et seq.* for the purpose of submitting 1,634 petitions containing 12,193 signatures in support of the attempt of the Communist Party to secure a place on the ballot for electors pledged to Gus Hall and Jarvis Tyner, the candidates of the Communist Party.

2. That affiant personally tendered the petitions to William Lloyd, administrative assistant to and representative of Edgar D. Whitcomb, Governor of the State of Indiana.

3. That Mr. Lloyd informed affiant that he would not accept the petitions on behalf of the Governor.

4. That Mr. Lloyd informed affiant that the Governor would not certify the petitions as legal petitions.

5. That Mr. Lloyd stated that the basis for his action was Burns IND. ANN. STAT. § 29-3812 and Attorney General Opinion No. 11.

6. That while Mr. Lloyd said he would allow affiant to leave the petitions at the Governor's office since it was a public office, he would not give affiant a receipt for them.

Affidavit of Simon Boorda in Support of Motion

7. That in view of the above-mentioned facts, affiant did not leave the petitions at the office.

8. That affiant is prepared to again tender the petitions at any time.

SIMON BOORDA

Subscribed and sworn to before me this 31st day of August, 1972.

PAULETTE E. CLARK
Notary Public

My Commission Expires:
4-13-76

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Amended Complaint

[CAPTION OMITTED]

1. This is an action challenging the constitutionality of *Ind. Ann. Stat.* §29-3812 (1969) which compels an existing or newly organized political party to have its officers file an unconstitutional affidavit with the Indiana State Election Board in order for such party to have its candidates' names appear on the ballot for any election.

2. This action is brought under Title 42 USC §1983 and jurisdiction is invoked pursuant to Title 28, USC §§1331, 1343, 2201, 2202, 2281 and 2284. The amount in controversy exceeds $10,000.

3. Plaintiff Communist Party of Indiana, an unincorporated voluntary association having its principal office in South Bend, Indiana, is the Indiana Division of the Com-

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munist Party of the United States, a national party, and seeks recognition as a new political party pursuant to *Ind. Ann. Stat.* §§29-3801 et seq. (1972 Supp.). It has never run candidates in Indiana who have received one-half of one percent (½%) of the total vote of the state of all parties at the last preceding general election.

4. Plaintiff Gus Hall, a resident of the State of New York, is the candidate of the Communist Party of the United States for the office of President of the United States at the 1972 general election. Plaintiff Jarvis Tyner, a resident

of the State of New York, is the candidate of the Communist Party of the United States for the office of Vice President of the United States at the 1972 general election.

5. The following plaintiffs are candidates of plaintiff Communist Party of Indiana for the office of electors for President and Vice President of the United States at the 1972 general election:

Michael T. Bayer	5751 East 6th Avenue, Gary, Indiana for PRESIDENTIAL ELECTOR
Carol Boner	827 East 46th Street, Indianapolis, Indiana for PRESIDENTIAL ELECTOR
Simon Boorda	533 North Blaine, South Bend, Indiana for PRESIDENTIAL ELECTOR
Viola Dawning	512 South Williams, South Bend, Indiana for PRESIDENTIAL ELECTOR
Pearl Dawning	512 South Williams, South Bend, Indiana for PRESIDENTIAL ELECTOR
Richard Leuchtag	4723 Hinesley Avenue, Indianapolis, Indiana for PRESIDENTIAL ELECTOR
Daniel Mack	7608 Linden Avenue, Hammond, Indiana for PRESIDENTIAL ELECTOR

Robert W. Mentzer	1701 Lincoln Way West, Mishawaka, Indiana for PRESIDENTIAL ELECTOR
	. [47]
Jerry Paar	1218 North Elmer, South Bend, Indiana for PRESIDENTIAL ELECTOR
James W. Perkins	1811 North Delaware, Indianapolis, Indiana for PRESIDENTIAL ELECTOR
Jesse Reese	2376 Washington Street, Gary, Indiana for PRESIDENTIAL ELECTOR
Curtis Robinson	1125 West Thomas Street, South Bend, Indiana for PRESIDENTIAL ELECTOR
Naomi L. Siskind	5225 Cornelius Avenue, Indianapolis, Indiana for PRESIDENTIAL ELECTOR

6. Plaintiff Ruth Norrick, a United States citizen and resident of Lake County, Indiana, is a duly registered voter who desires plaintiff Communist Party of Indiana and its candidates to appear on the ballot at the 1972 general election and desires to vote for them. Plaintiff Norrick has been deprived of her fundamental constitutional right to have the opportunity to vote for the plaintiffs' candidates for electors for President and Vice President of the United States at the 1972 general election by the unlawful

conduct of the defendants which is described later in this complaint. She sues on her own behalf and on behalf of all members of her class who are similarly situated. The number of members of her class is so numerous that joinder is impractical. The question of law and fact in this action are common to the class, and plaintiff will fairly and adequately represent the interests of the entire class.

7. The defendants are Edgar D. Whitcomb, individually and as Governor of the State of Indiana; Karl J. Stipher, individually and as a member of the Indiana State Election Board; and Thurman De Moss, individually and as a member of the Indiana State Election Board. Defendants com- [48]
pose the Indiana State Election Board. Defendant Whitcomb is chairman of that Board. The defendants, in their collective official capacity as the Indiana State Election Board, certify *inter alia* the names of all candidates to appear on the ballot for the 1972 general election pursuant to *Ind. Ann. Stat.* §§29-3801 et seq. (1972 Supp.).

8. On or about September 1, 1972, plaintiff Communist Party of Indiana, desiring to establish itself as a new political party throughout Indiana pursuant to *Ind. Ann. Stat.* §§29-3801 and to have its candidates placed on the ballots throughout the State of Indiana for the 1972 general election. Such candidates are lawfully qualified to hold the office for which each is a candidate.

9. In furtherance of the above stated goals plaintiff Communist Party of Indiana, on or about April 15, 1972, ordered new party petitions to be printed on its own behalf

and on behalf of plaintiff candidates for circulation to Indiana voters to gather signatures to qualify it as a newly organized political party and to enable plaintiff candidates to have their names appear on the 1972 general election ballot as required by *Ind. Ann. Stat.* §§29-3801 et seq. These petitions were received from the printer on April 29, 1972.

10. On or about May 1, 1972, plaintiff Communist Party of Indiana began to circulate its petitions to gather the [49] requisite signatures to qualify it as a newly organized political party and its candidates for listing on the ballot pursuant to *Ind. Ann. Stat.* §§29-3801 et seq.

11. On August 31, 1972 representatives of plaintiff Communist Party of Indiana went to the office of defendant Whitcomb for the purpose of submitting petitions required by §§29-3801 et seq.; said petitions numbered over 1600 and contained over 12,000 signatures of registered voters and met all lawful requirements of *Ind. Ann. Stat.* §§29-3801 et seq.

12. Plaintiff's representatives tendered said petitions to William C. Lloyd, Administrative Assistant to and Representative of defendant Governor Whitcomb.

13. William C. Lloyd acting on behalf of defendant Governor Whitcomb refused to accept said petitions for filing.

14. William C. Lloyd acting on behalf of defendant Governor Whitcomb informed plaintiff's representatives that defendant Governor Whitcomb would not certify said petitions as legal petitions and that the decision was based on *Ind. Ann. Stat.* §29-3812 and the Indiana Attorney General Opinion #11 of August 28, 1972. This decision was made with no hearing or safeguard procedures afforded plaintiffs.

15. Plaintiffs are currently in possession of said petitions. These petitions have sufficient signatures and satisfy

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all provisions of the Indiana Election Code except *Ind. Ann. Stat.* §29-3812. Further, plaintiffs are prepared to tender said petitions to defendants at any time.

16. *Ind. Ann. Stat.* §29-3812 states:

> "Elections—Ballots—Certain political parties barred—Doctrine and purposes of party—Investigation.—No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act (chs. 28-60 of this title), or which shall have

had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. *No existing or newly-organized political party* or organization *shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government.* The affidavit herein provided for shall be filed with the State Election Board or the County Election Board having charge of the printing of the ballot on which such ticket is to appear." (Emphasis supplied.)

17. Plaintiff Communist Party of Indiana, its officers and candidates decline to subscribe and refuse to file an [51] affidavit as required by *Ind. Ann. Stat.* §29-3812 on the grounds that such requirement is an evasion of fundamental rights secure to them under the Constitution of the United States.

18. At the request of the defendant Indiana State Election Board, Theodore Sendak, Attorney General of Indiana, issued official Attorney General Opinion #11. In said

opinion the Attorney General states that *Ind. Ann. Stat.* §29-3812 is valid and binding, and any political party which fails to adhere to the provisions which require the signing of loyalty oath described therein must not be placed on the Indiana ballot. The Attorney General further held the Communist Party of Indiana is not a political party in the same sense of the word as an indigenous political party in a representative democracy. Therefore, the Attorney General held that the Communist Party of Indiana would not be eligible to appear on the Indiana ballot even if its officers should sign an affidavit required by *Ind. Ann. Stat.* §29-3812.

19. *Ind. Ann. Stat.* §29-3812, as construed by the Indiana State Election Board and the Attorney General of Indiana required the Board to rule, and it did rule, that the nomination petitions that plaintiff Communist Party of Indiana attempted to file were invalid because they were not in conformity with *Ind. Ann. Stat.* §29-3812 and the Board refused to certify and place on the ballot for the November, 1972 general election the elector candidates of plaintiff's.

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20. The requirements of *Ind. Ann. Stat.* §29-3812 as applied to plaintiffs violate the United States Constitution because:

(a) It is vague and overbroad and as applied in violation of plaintiffs' right to freedom of speech and association guarded by the First Amendment.

(b) It is a Bill of Attainder prohibited by Article 1, Section 10, of the United States Constitution.

(c) The affidavit requirement of *Ind. Ann. Stat.* §29-3812 has been superseded by the acts of Congress which fully occupy the field to which these provisions of *Ind. Ann. Stat.* §29-3812 relate, rendering the latter invalid and unenforceable because it is repugnant to the Supremacy Clause, Article VI, Clause 2.

(d) The only oath or affidavit required of a presidential or vice presidential candidate or of a presidential elector is that required under Article 2, Section 1, of the Constitution of the United States for the president of the United States. Such candidates or electors cannot be required to make an affidavit which he or she would not have to make as president of the United States. Therefore, under the Supremacy Clause of the United States Constitution, any oath or affidavit required by state law of such candidates or electors in addition to the one required under Article 2, Section 1, is invalid.

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(e) *Ind. Ann. Stat.* §29-3812 arbitrarily and unreasonably subjects plaintiffs to burdens not imposed on the Republican or Democratic parties, their candidates or voters in violation of plaintiffs' right to due process and equal protection guaranteed by the Fourteenth Amendment.

21. The loyalty oath provisions of the Election Code have a chilling effect on plaintiffs' exercise of their rights under the First Amendment in that there is a widespread belief among qualified voters of Indiana that *Ind. Ann. Stat.* §29-3812 is an absolute bar to the appearance of plaintiff Communist Party of Indiana and its candidates on the ballot and that the efforts to qualify the plaintiff

Communist Party of Indiana as a new political party will thereby be nullified. In consequence, qualified voters who otherwise volunteer to circulate the nomination petition have declined and will decline to do so. Furthermore, registered and qualified voters who would otherwise have signed the nomination petition have declined to do so, some for the same reason and some because they fear the consequences of having their names publicly associated with a political party and its candidates who have been stigmatized by statute and barred from the ballot as disloyal and subversive. Continued enforcement and threat of enforcement of these provisions will continue to deter qualified voters from circulating and signing the petitions.

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22. Unless this Court promptly restrains the enforcement and implementation of the aforementioned unconstitutional statutory provision, the plaintiffs will suffer serious and irreparable injury in that they will be prevented from qualifying for recognition as a new political party and will be deprived of a place on the ballot in the November, 1972 general election without adequate remedy at law. Moreover, absence of relief will subject plaintiffs to injury which will be capable of repetition at future elections, yet will be evading judicial review.

WHEREFORE, plaintiffs pray for the following relief against the defendants, their successors and subordinates:

1. That pursuant to 28 USC §§1331, 1343, 2201, 2202, 2281 and 2284, a three-judge federal district court be immediately convened to hear and determine the merits of this case;

2. That a judgment be entered declaring *Ind. Ann. Stat.* §29-3812 to be unconstitutional facially and as applied;

3. That a preliminary and permanent injunction issue enjoining the defendants from enforcing, executing or implementing *Ind. Ann. Stat.* §29-3812;

4. That plaintiffs should be awarded all costs in connection with this action;

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5. That this Court grant such other and further relief as it may deem just and proper.

Respectfully submitted,

INDIANA CIVIL LIBERTIES UNION

By R. DAVY EAGLESFIELD
ROBERT JUSTICE
WILLIAM RASTETTER

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Stipulation of Facts

[CAPTION OMITTED]

Come now all parties by counsel and hereby stipulate as to the following:

1. Plaintiff Communist Party of Indiana is a division of the Communist Party of the United States and seeks recognition as a new political party pursuant to *Ind. Ann. Stat.* Sections 29-3801, *et seq.*, so that candidates may secure a place on the ballot in Indiana for the 1972 general election.

2. On August 31, 1972, representatives of plaintiff Communist Party of Indiana presented over 1,600 petitions containing more than 9,000 signatures of persons to the office of defendant, Edgar D. Whitcomb; these signatures are in excess of the amount required by *Ind. Ann. Stat.* Section 29-3801.

3. While present in the office of defendant Governor Whitcomb on August 31, 1972, plaintiffs' representatives tendered said petitions to William C. Lloyd, Administrative Assistant to and representative of defendant Governor Whitcomb.

4. William C. Lloyd, acting on behalf of defendant

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Governor Whitcomb and pursuant to instructions of defendant Governor Whitcomb, refused to accept said petitions for filing.

Stipulation of Facts

5. William C. Lloyd, acting on behalf of defendant Governor Whitcomb, informed plaintiffs' representatives that their petitions would not be certified as legally valid petitions and that defendants admit this decision was based in part on *Ind. Ann. Stat.* Section 29-3812 and Official Opinion No. 11 of the Indiana Attorney General, dated August 28, 1972.

6. The statement made by William C. Lloyd to plaintiffs' representatives that plaintiffs' petitions would not be certified as legally valid petitions was made pursuant to instructions from the State Election Board.

7. The one ground made known to plaintiffs for defendant Governor Whitcomb's refusal to accept said petitions for filing and a basis for defendant Indiana State Election Board's position that said petitions should not be certified as legally valid petitions, regardless of whether an affidavit prescribed by *Ind. Ann. Stat.* Section 29-3812 has been filed, was the provisions of *Ind. Ann. Stat.* Section 29-3812 as construed in Official Opinion No. 11 of the Indiana Attorney General, dated August 28, 1972.

8. That the number of registered voters whose signatures are needed on petitions to comply with *Ind. Ann.* [78]
Stat. Section 29-3801, which requires the signatures of ½ of 1% of the total votes for Secretary of State at the last previous general election is 8,466.

Stipulation of Facts

Dated this 22nd day of September, 1972.

THOMAS NEAL
Deputy Attorney General

EDWARD W. JOHNSON
Assistant Attorney General
Attorneys for Defendants
Office of Attorney General
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Telephone: 317—633-6234

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ROBERT JUSTICE
Attorneys for Plaintiffs
Indiana Civil Liberties Union
527 Thomas Building
Indianapolis, Indiana 46204
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Part II of Defendants' Motion to Dismiss

Come now the defendants and for Part II of their Motion to Dismiss move the court to dismiss this action for failure to state a cause of action upon which relief can be granted pursuant to Rule 12b (6) for the following reasons:

1. The plaintiffs base their action on Title 42 U.S.C. 1983. Plaintiff Communist Party of Indiana is not a person and obtains no rights under this section for that reason.

2. Plaintiff Communist Party of Indiana is denied rights under Title 42 U.S.C. 1983 by Title 50 U.S.C. section 841 *et seq.* and in particular section 842. Title 50 U.S.C. section 842 reads as follows:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section

shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, § 3, 68 Stat. 776.

WHEREFORE, Defendants ask that this action be dismissed.

THEODORE L. SENDAK
Attorney General of Indiana

THOMAS R. NEAL
Deputy Attorney General

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Answer to Amended Complaint

[CAPTION OMITTED]

First Defense

Come now the defendants and for the first defense to plaintiffs' amended complaint filed herein by the plaintiffs allege as follows:

1. The answer to rhetorical paragraph 1 of plaintiffs' amended complaint defendants admit the allegations, stating that the action challenges Burns' Ind. Stats. §29-3812, but deny all other allegations.

2. For answer to rhetorical paragraph 2, defendants admit that this action is alleged under Title 42, U.S.C. §1983 and that jurisdiction is sought pursuant to Title 28 U.S.C. §§1341, 1343, 2201, 2202, 2281 and 2284, but deny that the amount in controversy exceeds the amount of 10,000 and further that this Court has jurisdiction.

3. Defendants admit rhetorical paragraph 3 of plaintiffs' amended complaint.

4. Defendants admit the allegations contained in rhetorical paragraph 4 of plaintiffs' amended complaint.

5. Defendants admit the allegations contained in rhe-

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torical paragraph 5 of plaintiffs' amended complaint.

Answer to Amended Complaint

6. Defendants are without knowledge as to the first sentence and deny all other allegations set out in rhetorical paragraph 6 of plaintiffs' amended complaint.

7. Defendants admit the allegations contained in rhetorical paragraph 7 of plaintiffs' amended complaint.

8. Defendants deny the allegations contained in rhetorical paragraph 8 of plaintiffs' amended complaint.

9. Defendants are without knowledge as to the truth of the allegations set out in rhetorical paragraph 9 of plaintiffs' amended complaint.

10. Defendants are without knowledge as to the truth of the allegations set out in rhetorical paragraph 10 of plaintiffs' amended complaint.

11. Defendants admit the allegations of rhetorical paragraph 11 of plaintiffs' amended complaint, that the representatives of the plaintiffs, Communist Party of Indiana, went to the office of Defendant Whitcomb on August 31, 1972, for the purpose of submitting petitions required by Burns' §29-3801 *et seq.*, but deny that said petitions numbered over 1600 and contained over 12,000 signatures of registered voters and met all lawful requirements of Burns' Ind. Ann. Stats. §29-3801 *et seq.*

12. Defendants admit the allegations contained in rhetorical paragraph 12 of plaintiffs' amended complaint.

Answer to Amended Complaint

13. Defendants admit the allegations contained in rhetorical paragraph 13 of plaintiffs' amended complaint.

14. In response to rhetorical paragraph 14 of plaintiffs' amended complaint defendants admit that William C. Lloyd, acting on behalf of defendant Whitcomb, informed the plaintiffs' representatives that defendant Whitcomb would not certify said petitions as legal petitions and that the decision was based, *in part,* on Burns' §29-3812 and
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the Indiana Attorney General's Opinion #11. Defendants deny this decision was made without procedural safeguards.

15. In answer to rhetorical paragraph 15 of plaintiffs' amended complaint the defendants state that they are without knowledge as to the current possession of petitions and deny all other allegations.

16. Defendants admit the allegations contained in rhetorical paragraph 16 of plaintiffs' amended complaint.

17. For answer to rhetorical paragraph 17 of plaintiffs' amended complaint defendants admit that the plaintiffs refused to prepare and file an affidavit as required by Burns' Indiana law, but deny all other allegations therein contained.

18. Defendants admit the allegations contained in rhetorical paragraph 18 of plaintiffs' amended complaint except that Attorney General's Opinion #11 contains more grounds for its position than those alleged.

Answer to Amended Complaint

19. In answer to rhetorical paragraph 19 of plaintiffs' amended complaint, the defendants admit the allegations therein contained except that defendants deny any implication therein contained that petitions submitted by plaintiffs were valid in all respects except that they were not in conformity with Indiana Annotated Statute, Sec. 29-3812.

20. Defendants deny the allegations contained in rhetorical paragraph 20 of plaintiffs' amended complaint.

21. Defendants deny the allegations contained in rhetorical paragraph 21 of plaintiffs' amended complaint.

22. Defendants deny the allegations contained in rhetorical paragraph 22 of plaintiffs' amended complaint.

Second Defense

The plaintiffs' action is barred by the doctrine of laches in that they have failed to pursue diligently the vindication of their alleged [88] rights and have thereby placed upon the defendants a great burden. Plaintiffs, by their own admission, knew in April of 1972 that they were going to seek a position on the ballot and accordingly began obtaining the required signatures on petitions pursuant to Ind. Ann. Stat. §§29-3801 *et seq.* However, they have waited until the last minute to file their petitions and attempt through this Court to obtain a position on the ballot. Because of the dilatory manner in which the plaintiffs have proceeded, the defendants have been required to check, at the last minute, the validity of the signatures submitted,

forestall the printing of the ballots, a process which would normally have already begun, as well as prepare to defend this litigation. Plaintiffs' "eleventh hour" attempt to secure a position on the ballot has created a burden on the defendants which could have been avoided had the plaintiffs been diligent in seeking relief in April of 1972 when the ripening seeds of this controversy existed.

Third Defense

For third defense to plaintiffs' amended complaint defendants allege as follows:

1. That the petitions submitted by the plaintiffs herein falsely and inaccurately represent the parties signing as qualified to sign the petitions.

2. That in fact there were not sufficient signatures by qualified persons to qualify the petitions under the statutory requirements set forth in Acts 1945, Ch. 208, §106, as amended, and found in Burns' Ann. Stat. (1969 Repl.) 29-3801.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint.

THEODORE L. SENDAK
Attorney General of Indiana

THOMAS R. NEAL
Deputy Attorney General

EDWARD W. JOHNSON
Deputy Attorney General

[94]

Petition for Mandate to Enforce the Prior Order of the Court

[Filed Oct. 3, 1972]

[CAPTION OMITTED]

In *Communist Party of Indiana* v. *Edgar D. Whitcomb*, Cause No. 72 H 224 (September 28, 1972), a three-judge panel ordered the Communist Party of Indiana to submit at any time prior to 2:00 p.m. on Friday, September 29, 1972, an oath pursuant to the context of that opinion that said party does not advocate the overthrow of local, state or national government by force or violence. The Order further stated that if said oath was submitted by the Communist Party to the State Election Board or its representative within the time limit specified above, then said party should be certified by the State Election Board for inclusion on the national ballot upon which said party sought inclusion. The Order further stated:

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"In the event that the Communist Party of Indiana shall submit an affidavit in keeping with this memorandum and order and within the time herein prescribed, the defendant State Election Board and members thereof shall certify said party and cause their inclusion on the National Ballot printed in the state of Indiana as well as upon the labels used on all voting machines in this state."

On September 29, 1972, at 11:36 a.m., the Communist Party of Indiana submitted to a representative of the State

Election Board an oath in keeping with the Memorandum and Order aforementioned. At that time said affidavit was accepted by a representative of the State Election Board and stamped *filed*. Said affidavit is attached as *Exhibit A*.

In order to make it perfectly clear to the State Election Board, the Court and the citizens of Indiana, that said party was not perjuring itself, the last sentence of said affidavit was attached. This last sentence is not intended to legally modify the oath taken above, but states the law as it applies to the term "advocate," as stated by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320. Thus, the plaintiff, Communist Party, can with a clear conscience sign the attached affidavit.

Also at the time of filing the above-mentioned affidavit were filed, with the same representative of the State Election Board, approximately 12,000 signatures on petitions as required by *Ind. Ann. Stat.* §29-3801, *et seq.* These were also accepted by said representative.

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After the acceptance of said documents, the Communist Party of Indiana, was told by Wayne Davis, Chief Deputy of the Election Board, to be at a meeting of the Election Board to be held in the State House at 2:15 p.m., September 29, 1972.

At said meeting the State Election Board disregarded the Order of the three-judge panel and would not include the Communist Party on the National Ballot in the upcoming November election for the reason that the attached affidavit did not comply with the Court Order and on the grounds that the petitions filed with the Board were insufficient.

Petition for Mandate to Enforce the Prior Court Order

WHEREFORE, the plaintiffs request the Court issue an order mandating and requiring said defendants to comply with the September 28, 1972, Order of the three-judge panel and cease their refusal to include plaintiff Communist Party on the national ballot.

INDIANA CIVIL LIBERTIES UNION

By R. DAVY EAGLESFIELD III
527 Thomas Building
Indianapolis, Indiana 46204
Telephone: 317-635-4056

STATE OF INDIANA,
COUNTY OF MARION, *ss.*:

Subscribed and sworn to before me, a Notary Public, in and for the above county and state, this 29th day of September, 1972.

MELISSA D. POLLARD
Notary Public

My commission expires:
May 31, 1976

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Mandate has been delivered to the Attorney General of Indiana, State Capitol Building, Indianapolis, Indiana, this 29th day of September, 1972.

R. DAVY EAGLESFIELD III

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AFFIDAVIT

We, the undersigned officers of the Communist Party of Indiana, upon our oaths do hereby swear that said Party does not advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action."

SIMON BOORDA
Simon Boorda, Chairman
Communist Party of Indiana

AVANELLE BOORDA
Avanelle Boorda, Treasurer
and Acting Secretary
Communist Party of Indiana

Petition for Mandate to Enforce the Prior Court Order

STATE OF INDIANA,
COUNTY OF MARION, *ss.*

Subscribed and sworn to before me, a Notary Public in and for the above county and state, this 29th day of September, 1972.

MELISSA D. POLLARD
Notary Public
FILED
Sep 29 1972
STATE ELECTION BOARD
11:36 A.M.

My commission expires:
May 31, 1976

[111]

Motion to Amend

[Filed Oct. 10, 1972]

[CAPTION OMITTED]

Come now plaintiffs by counsel, pursuant to Rule 52(b) and Rule 59(e) of the Federal Rules of Civil Procedure, and move the court for an order amending the Memorandum and Order issued by this court on September 28, 1972, in the following respects:

1. Include a determination and conclusion of law that the portion of IND. ANN. STAT. § 29-3812 providing "that it does not advocate the overthrow of local, state or national government by force or violence" is constitutional [112] only insofar as it proscribes advocacy directed at promoting unlawful action, as distinguished from advocacy of abstract doctrine;

2. Include a determination, finding of fact and conclusion of law that the affidavit submitted by officers of plaintiff Communist Party to Indiana to defendants on September 29, 1972, complies in all respects with the September 28, 1972 Memorandum and Order as amended; the Amended Memorandum and Order should thus once again compel defendants to place plaintiff Communist Party of Indiana and its candidates on the ballot for the 1972 general election; and

Motion to Amend

3. Include a determination and finding of fact that the evidence proffered by defendants pertaining to the validity of signatures on petitions submitted by plaintiff Communist Party of Indiana was by acknowledgement of defendants' attorneys in open courtroom insufficient to prove their contention that plaintiff Communist Party of Indiana has not submitted petitions which meet the requirements of IND. ANN. STAT. § 29-3801 *et seq.*

INDIANA CIVIL LIBERTIES UNION

WILLIAM RASTETTER
R. DAVY EAGLESFIELD
Attorneys for Plaintiffs
527 Thomas Building
Indianapolis, Indiana

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Notice of Appeal

[Filed Oct. 10, 1972]

[CAPTION OMITTED]

Pursuant to 28 U.S.C. § 1253, plaintiffs in the above-captioned cause hereby give notice that they appeal to the United States Supreme Court this court's order denying injunctive relief requested by plaintiffs insofar as this court held the first portion of IND. ANN. STAT. § 29-3812 to be constitutional.

INDIANA CIVIL LIBERTIES UNION

WILLIAM RASTETTER
R. DAVY EAGLESFIELD
527 Thomas Building
Indianapolis, Indiana

[129]

Motion to Withdraw Notice of Appeal

[Filed Oct. 17, 1972]

[CAPTION OMITTED]

Come now plaintiffs in the above-captioned matter, by counsel, and hereby request this honorable court for leave to withdraw their Notice of Appeal until such time as this court acts upon plaintiffs' Motion to Amend filed with this court on October 10, 1972, and in support of this motion plaintiffs allege and say:

1. That on October 10, 1972, plaintiffs filed a Notice of Appeal with this court.

2. That said Notice of Appeal was filed solely because plaintiffs were attempting to obtain emergency relief from the United States Supreme Court.

3. That the United States Supreme Court has subsequently decided not to hear plaintiffs' request for emergency relief.

4. That the purpose for plaintiffs filing said Notice of Appeal has thus been obviated.

5. That plaintiffs desire this court to act upon their Motion to Amend filed on October 10, 1972, prior to deciding whether they intend to appeal the decision in this cause.

Motion to Withdraw Notice of Appeal

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6. That therefore plaintiffs desire to withdraw their Notice of Appeal so that it will not pose a bar to this court acting upon the Motion to Amend filed on October 10, 1972.

WHEREFORE, plaintiffs respectfully request this honorable court to allow them to withdraw their Notice of Appeal as prayed.

INDIANA CIVIL LIBERTIES UNION

WILLIAM RASTETTER
R. DAVY EAGLESFIELD
Attorneys for Plaintiffs
527 Thomas Building
Indianapolis, Indiana 46204

Opinions

The relevant opinions and orders of the United States District Court are contained in the Appendix to the Jurisdictional Statement at pp. 1a-6a. Appellants' November 29, 1972 Notice of Appeal is contained in the Appendix to the Jurisdictional Statement at p. 7a. The Indiana Attorney General's Official Opinion No. 11 is contained in the Appendix to the Jurisdictional Statement at pp. 9a-19a.